Ng Seng Hwa v CI Holdings Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1-22-331-92
SHAIK DAUD J
23 NOVEMBER 1993

Civil Procedure *— Res judicata — Similar issues already adjudicated upon in previous action — Whether new issues should have been raised in former action — Rules of the High Court 1980 O 18 r 19*

The defendant applied to strike out the plaintiff's writ and statement of claim under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') on the ground that: (i) it was scandalous, frivolous and vexatious and may prejudice, embarrass or delay the fair trial of the action; and (ii) the issues raised by the plaintiff in his statement of claim had been adjudicated in another case and a decision thereof handed down. The plaintiff, however, submitted that this present suit was of a different character, ie in the earlier suit, the issue was whether the plaintiff had exercised the option granted by the defendant or whether the option had lapsed, whereas the issues in this action were whether the plaintiff had been induced by representations made by the defendant into leaving his previous employment and entering into the defendant's employment.

Held, striking out the plaintiff's writ and statement of claim:

(1) It was clear that the parties were the same in both actions, and both actions were grounded on the same issue, ie whether the option had lapsed. Therefore, the subject matter was the same. The court had, in the former action, made a final decision on this and, on the doctrine of res judicata, the plaintiff was completely barred from agitating the matter again. His remedy was simply to appeal against the former decision. This he failed to do. Therefore, he was barred from instituting this suit based on the same cause of action.

(2) Even though the so-called new issue was not to be found in the plaintiff's statement of claim in the former action, nevertheless the plaintiff did raise this issue in a disguised manner in the striking out proceedings. In any event, the so-called new issue could and should have been raised in the earlier action. Matters which could have been raised in an earlier action should have been raised then and this is the doctrine of res judicata in its wider sense. On the facts of this case, both the narrow and wider sense of the doctrine of res judicata applied and the plaintiff was completely barred from instituting the present action based on the same cause of action and same reliefs being sought.

[Bahasa Malaysia summary

Defendan memohon untuk membatalkan writ dan pernyataan tuntutan plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa: (i) ia mengaib, remeh dan menyusahkan dan mungkin menjejas, menghalang atau melengahkan perbicaraan adil tindakan itu; dan (ii) isu yang ditimbulkan oleh plaintif di dalam pernyataan tuntutannya telah dibicarakan dalam suatu kes yang lain dan suatu penghakimannya mengenainya telahpun diberikan. Akan tetapi, plaintiff menghujahkan bahawa tindakan ini mempunyai sifat yang berlainan, iaitu dalam tindakan yang lebih awal itu, isunya adalah sama ada plaintif telah mengambil opsyen yang diberikan oleh defendan atau sama ada opsyen itu telah luput, manakala isu dalam tindakan ini adalah sama ada plaintif telah didorong oleh representasi yang dibuat oleh defendan untuk meninggalkan pekerjaannya yang dahulu dan memasuki penggajian defendan.

Diputuskan, membatalkan writ dan pernyataan tuntutan plaintif:

(1) Memanglah jelas bahawa pihak kepada kedua-dua tindakan itu adalah sama dan kedua-dua tindakan itu berdasarkan isu yang sama, iaitu sama ada opsyen itu telah luput. Oleh itu, perkara subjeknya adalah sama. Mahkamah telah, dalam tindakan dahulu, membuat suatu keputusan muktamad mengenainya, dan atas doktrin res judicata, plaintif dihalang sepenuhnya daripada menimbulkan perkara itu semula. Remedinya hanya untuk membuat rayuan terhadap keputusan terdahulu itu. Beliau gagal berbuat demikian. Oleh itu, beliau dihalang daripada memulakan tindakan ini berdasarkan kausa tindakan yang sama.

(2) Walaupun isu yang dikatakan isu yang baru itu tidak didapati di dalam pernyataan tuntutan plaintif dalam tindakan terdahulu itu, plaintif telah menimbulkan isu itu dalam bentuk yang tersamar dalam prosiding membatalkan pliding. Bagaimanapun, isu yang dikatakan baru itu boleh dan patut ditimbulkan dalam tindakan terdahulu itu. Perkara yang mungkin ditimbulkan dalam suatu tindakan yang lebih awal seharusnya ditimbulkan pada masa itu dan ini merupakan doktrin res judicata mengikut maksudnya yang lebih luas. Pada fakta kes ini, res judicata mengikut kedua-dua maknanya yang terhad dan luas terpakai dan plaintif dihalang sama sekali daripada memulakan tindakan ini berdasarkan kausa tindakan yang sama dan menuntut relief yang sama.]

Notes

For cases on res judicata based on similarity of issues, see 2 *Mallal's Digest* (4th Ed) paras 1957–1959.

Cases referred to

1 *Southern Finance Co Bhd v Lee Geok Lim* [1991] 1 CLJ 575 (folld)
2 *Mensa Mercantile (Far East) Pte Ltd v Elkobina (M) Sdn Bhd & 2 Ors* [1991] 1 CLJ 772 (folld)
3 *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581; [1975] 2 WLR 690 (folld)

David Morais (*Sri Ram & Co*) for the plaintiff.
Loy Chee Say (*Nahappan, Dorairaj & Danker*) for the defendant.

Cur Adv Vult

Shaik Daud J: This is an application by the defendant to strike out the plaintiff's writ and statement of claim under O 18 r 19 of the Rules of the High Court 1980, on the ground that it is scandalous, frivolous and vexatious and it may prejudice, embarrass or delay the fair trial of the action and also on the ground that the issues raised by the plaintiff in his statement of claim has been adjudicated and the High Court judge had made a decision thereof.

By this order the court has power, albeit a drastic one, in a summary manner and without a trial, to stay or dismiss an action or to enter a judgment accordingly where the pleadings disclose no reasonable cause of action or defence and are scandalous, frivolous or vexatious or they prejudice, embarrass or delay the fair trial of the action or are otherwise an abuse of the process of the court. Whilst this drastic power exists, it should only be exercised in obvious cases. The mere fact that a case is weak and not likely to succeed is no ground for striking it out under this order. Bearing this in mind, I now have to scrutinize this application to see if I can and ought to exercise my discretion to strike out the plaintiff's writ and statement of claim. It is the defendant's contention as deposed to in the affidavit in support of their application affirmed by one Vincent Tan, the chairman of the defendant company on 23 April 1993, that the plaintiff's claim is an abuse of the process of the court because all the issues raised by the plaintiff in his statement of claim had been adjudicated by the High Court and a decision handed down on those issues in another case, ie Kuala Lumpur High Court Civil Suit No D2–22–1037–90. In the present suit, the plaintiff is seeking specific performance of an Option No 001 and damages resulting from failure to exercise the option. In the former Suit No D2–22–1037–90, the writ and statement of claim also pray for specific performance of the same option and consequential damages. That case was heard before Siti Norma Yaakob J on 16 August 1991 and a judgment given on 20 August 1991, whereby the learned judge struck out the plaintiff's writ and statement of claim under O 18 r 19. Whereupon the plaintiff applied for further arguments in open court which was not allowed by the judge and she issued a certificate to that effect. No appeal, however, was lodged by the plaintiff.

In the former proceedings, one main issue was canvassed, ie whether the option had lapsed and if so, no cause of action had arisen. The court agreed that the option had lapsed and therefore no cause of action had arisen and thereby allowed the defendant's application to strike out the plaintiff's writ and statement of claim. In that application to strike out, the plaintiff filed an affidavit-in-reply to the defendant's affidavit in support of their application. The plaintiff's own affidavit was affirmed on 1 November 1990. On perusing this affidavit, one cannot help perceiving that it is identical to the plaintiff's present statement of claim, almost paragraph by paragraph, eg paras 3, 4(a), 4(b), 5 and 6, etc, of that affidavit are identical almost word for word with paras 3, 4.1, 4.2, 5 and 6, respectively, of the statement of claim in the present action. What has been done appears to be that the contents of the affidavit had been converted into the present statement of claim. The present action also prays for specific performance of the same option. As I stated earlier the court had, in the former case, decided that the option had lapsed and therefore no cause of action had arisen. In the light of this, it seems clear to me and I agree with the submission of the counsel for the defendant that the doctrine of res judicata applies in the present action. In *Southern Finance Co Bhd v Lee Geok Lim*,[1] it was established that the defendant, one L, being the registered owner of land, had charged her property to the plaintiff, S, as security for a loan. Due to default in payment by the defendant, the plaintiff sought an order for sale of the said land by public auction under s 256 of the National Land Code 1965 ('the NLC'). The defendant contended, firstly, that the plaintiff had charged interest at 4% over and above the prescribed rate of interest and, secondly, that this charge action was barred by the doctrine of res judicata as there was an earlier charge action between both parties on the same subject matter invoking the same issue of excessive penalty interest. That earlier action was dismissed when the court held that the penalty interest charged was contrary to s 256(3) of the NLC. The court agreed and held that 'cause of action estoppel' operated as a complete bar against the second action of the plaintiff on the ground that the cause of action in the second action was said to be the same because it emanated from the same charge and the reliefs prayed for were the same. In *Mensa Mercantile (Far East) Pte Ltd v Elkobina (M) Sdn Bhd & Ors*,[2] the court held that for the doctrine of res judicata to apply there must also be priority of interest between the parties in the first action and the parties in the subsequent action.

In the present case, it is as clear as daylight that the parties are the same in both actions, and both actions are grounded on the same issue, ie whether the option had lapsed. Therefore, the subject matter is the same. The court had, in the former action, made a final decision on this and, on the doctrine of res judicata, the plaintiff is completely barred from agitating the matter again. His remedy was simply to appeal against the decision of Siti Norma Yaakob J striking out his writ of summons and statement of claim. This he failed to do. Therefore, he is barred from instituting this suit based on the same cause of action.

The learned counsel for the plaintiff submits that this present suit is of a different character. He says that in the earlier suit, the issue was whether the

plaintiff had exercised the option or whether the option had lapsed and since the court then held that the option had lapsed it struck out the writ. In the present action, however, the issues are whether the plaintiff was induced by representations made by the defendant into leaving his previous employment and entering into the defendant's employment. With respect, even though this so-called new issue is not to be found in the plaintiff's statement of claim in the former action, nevertheless the plaintiff did raise this issue in a disguised manner in the striking out proceedings. In his affidavit, he did raise this issue though not exactly in similar words (see para 5 of the affidavit). Be that as it may, even if I am wrong on this, it is my view that this so-called new issue could and should have been raised in the earlier action. Matters which could have been raised in an earlier action should have been raised then. This is the doctrine of res judicata in its wider sense. In *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor*,[3] in regard to the doctrine of res judicata, Lord Kilbrandon said at p 590:

> But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of the process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

It seems clear to me that on the facts of this case, both the narrow and wider sense of the doctrine of res judicata applies and the plaintiff is completely barred from instituting the present action based as it were, on the same cause of action and same reliefs being sought. Therefore, I am satisfied that this is a fit and proper case for me to exercise my discretion under O 18 r 19 to strike off the plaintiff's writ of summons and statement of claim and I so do.

Application allowed.

Reported by Anne Khoo